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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 585 314 US 665

J. EDWARD JONES, PETITIONER,

VS.

JOSEPH P. KENNEDY, JAMES M. LANDIS, GEORGE C. MATHEWS AND ROBERT E. HEALY, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

and

BRIEF IN SUPPORT THEREOF.

JAMES J. LAUGHLIN,
National Press Building,
Washington, D. C.,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

J. Edward Jones prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in this cause on March 17, 1941.

QUESTIONS PRESENTED.

1. Are officers of the government of the United States protected by the immunity of their office when they enter into a conspiracy to destroy the business of a citizen of the United States?

2. Can officers and employees of the United States claim immunity from suit when they go wholly beyond the scope of their governmental authority in harassing and persecuting a citizen of the United States and are guilty of slander and libel against the same citizen and make false charges before a branch of the government and present false evidence—which they know to be false—to obtain a criminal indictment?

3. Can officers and employees of the United States enter into a conspiracy to deny to a citizen of the United States the exercise of his civil rights and then escape the consequences of their acts by claiming the immunity of their governmental duties?

4. The right of attorneys in the employ of the United States to represent officers and employees of the government when they are sued in their personal and private capacities.

STATEMENT OF THE CASE.

Petitioner, J. Edward Jones, has, for many years, been engaged in the oil business and has maintained offices at 342 Madison Avenue, New York City. His business has been chiefly concerned with the buying and selling interests in crude oil producing properties. In his business he retained a research staff engaged in studies of petroleum economics and the problems of the petroleum industry, in the course of which he espoused the cause of the so-called "independents" of the industry in

their controversy with major petroleum organizations and in the efforts of the "independents" to enlighten public policy with regard to the facts and conditions relating thereto.

In March, 1933, the American public was advised of a change in the governmental policy toward industry involving a "New Deal" that implied the adoption of principles for the protection of individuals (so-called "forgotten men") situated in industry similar to the position of that occupied by "independents" of the petroleum industry. Consequently one of the first acts of the new administration was to call a "Governors' Oil Conference" to meet in Washington. The conference was called by Harold L. Ickes, Secretary of the Interior, who stated in his invitation to the governors the announced purpose of said conference as one for "solving the problems" of the petroleum industry. The invitation stated that the principle problem to be "grappled with" was "one of overproduction" of crude oil in this country.

Petitioner went to Washington to attend such oil conference and had occasion to meet the Secretary of the Interior. Petitioner was astonished to find that the Secretary of Interior was using erroneous statistics relating to the relationship of supply and demand and the petitioner respectfully pointed out to Mr. Ickes facts and true figures respecting the relationship of supply and demand of crude oil and informed the Secretary of the Interior of the statistical position of the petroleum industry with regard thereto.

Petitioner who has always been the champion of the independents in the petroleum industry also discovered that either by accident or design the invitation of the Secretary of the Interior to the oil conference was not sent to the governors of certain oil-producing states and since it would not be a representative meeting petitioner made a personal appeal to the governors of those oil-producing states, who had not been invited, to make an ap-

peal to the Secretary of the Interior for representation at the said Governors' Oil Conference.

After the petitioner had brought about the enlargement of the oil conference the Secretary of the Interior true to form resented the interest of the petitioner in an effort to make it a representative meeting and it was this resentment of Mr. Ickes that laid the foundation for the conspiracy to destroy the petitioner and to ruin his business. When the petitioner found that the Secretary of the Interior was not honest and sincere in his effort to stabilize the oil business he deemed it his duty as an American citizen to make his views known to the Congress of the United States and he thereupon appeared before various committees of the House of Representatives and the Senate of the United States to oppose legislation sponsored by the Secretary of the Interior and a memorial was presented to every member of the Congress regarding the problems of the petroleum industry. A copy of such memorial was made a part of the proceedings in the court below.

Soon after the memorial in question was presented to members of the Congress the Secretary of the Interior delivered a public address in Dallas, Texas, and condemned severely the policies of our leading petroleum industries and threatened nationalization of the American petroleum industry as a public utility. Petitioner saw in this move by the Secretary of the Interior a real threat to the fundamental principle of the American system of government and sensing the danger that confronted the industry if Mr. Ickes was not checked addressed a communication to the President of the United States calling upon the President to remove Mr. Ickes from his office as Administrator for the Code of Fair Competition for the Petroleum Industry, which office Mr. Ickes held by appointment of the President by virtue of the authority vested in the President by the National Industrial Recovery Act (now defunct). A copy of the letter sent to the

President by the petitioner was made a part of the records in the court below.

It seems useless to relate that Mr. Ickes was angered at the request of the petitioner and the newspaper publicity attendant thereon and there was then set in motion a conspiracy against the petitioner that surpasses anything this country has seen, when the identity of the conspirators is taken into consideration. The many acts and unlawful practices indulged in by the conspirators seem almost beyond the realm of belief and so far beyond the scope of their official duties did they go that the allegations of the petitioner would be regarded as a product of the imagination if we did not have actual facts and *bona fide* evidence to support every allegation made by the petitioner.

In the course of petitioner's business he caused to be filed with the Securities and Exchange Commission a registration statement for an investment trust. The registration statement was in proper form and in accordance with law. The filing of the registration statement by the petitioner gave the conspirators the vehicle they had sought to destroy the petitioner. Since the members of the Securities and Exchange Commission were appointees of the same president as Secretary Ickes the petitioner alleges that the respondents agreed to make allegations that the registration statement submitted by the petitioner was affirmatively and negatively deficient and was not in compliance with law. Although the registration statement was in compliance with law the respondents released and caused to be released to the press false statements which were known by the respondents to be false—said statements reflecting upon the business activities of the petitioner and the respondents further issued statements to the effect that the registration submitted by the petitioner was not in compliance with law when the respondents well knew that said registration statement met every requirement of the statutes.

Petitioner further alleged that, although respondents well knew that the registration statement was in full compliance with law and that no issue had been adjudicated between the Securities and Exchange Commission and the petitioner, the respondents caused to be released to the newspaper statements to the effect that the registration statement was deficient and that the commission would proceed with so-called "stop order" proceedings. Of course, it is plain to see that this activity was very detrimental to the business of the petitioner in as much as such newspaper releases carried with them the blessing and approval of an agency of the United States.

Petitioner was summoned before the Securities and Exchange Commission for a hearing and the respondents designated a member of their own staff to preside over such hearing. Of course, such employe could not act impartially. At this hearing petitioner was subjected to questioning upon matters not pertinent to the issues involved and it was soon apparent that the method of procedure was a part of the conspiracy entered into by the respondents in that among other things respondents obtained the names of petitioner's clients and then sought to harass and annoy said clients and to induce said clients to cease business dealings with petitioner.

After petitioner realized that the proceedings before the Securities and Exchange Commission were not in good faith he tendered to the commission a complete and unequivocal withdrawal of his registration statement (Record 71) and did thereupon terminate the authority and jurisdiction of the Securities and Exchange Commission. However, to the great surprise of the petitioner the commission refused to accept such withdrawal and proceeded with its hearing and thereupon petitioner to protect his rights appealed to the courts.

It must never be forgotten that this court in a notable and far-reaching opinion supported the contentions of petitioner and severely rebuked the respondents (Record

72). See *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1.

The respondents were not content with the castigation meted out by this court and, smarting under the rebuke given them, carried the conspiracy further and by means of false testimony which they knew to be false succeeded in bringing a criminal indictment against petitioner in the Federal Court for the Southern District of New York (Record 68) and after repeated dilatory tactics on the part of the government petitioner was finally able to obtain a trial on the criminal charge and the falsity of the government charges was clearly established when the jury exonerated petitioner (Record 68).

After his acquittal by a jury petitioner believed that democracy would be in peril if such activities were not checked at the source and thereupon prepared for publication a book entitled, "And So They Indicted Me," but respondents, through their agents, visited various publishers and told them if they agreed to publish petitioner's book they would face reprisals from various officials in Washington and publishers were thereupon intimidated and threatened and petitioner's civil rights were therefore interfered with. It was necessary therefore for petitioner to arrange himself for the publishing of said book and this entailed much time and expense on his part, which would have been avoided if respondents had not interfered with his civil rights.

Petitioner filed suit in the District Court of the United States for the District of Columbia for $1,000,000 against Joseph P. Kennedy, James M. Landis, George C. Mathews and Robert E. Healy. Respondents filed a motion to dismiss on the ground that the acts alleged in the complaint (Record 1 to 8) were within the scope of the authority of respondents and hence they were immune from suit (Record 9 to 14). After argument the declaration was dismissed with leave to amend.

An amended complaint was filed (new rules now being effective) and with leave of the court there was joined in the complaint John J. Burns, general counsel for the Securities and Exchange Commission, John L. Flynn, a member of the legal staff of the commission, Wm. H. Rabell, a member of the commission's accounting staff. The defendants, Burns, Flynn and Rabell, evaded service of process and they have not yet been served. The amended complaint (Record 15 to 44) went into more elaborate detail as to various phases of the conspiracy. This was done to take the complaint out of the rule laid down by this court in *Spalding* v. *Vilas*, 161 U. S. 483. Respondents filed another motion to dismiss on the ground that they were immune from suit (Record 51, 52). After argument the complaint was dismissed with leave to amend.

A second amended complaint was filed (Record 53 to 73). The second amended complaint alleged among other things the following specific acts to show that the respondents went far beyond the scope of their authority:

> 1—Respondents unlawfully seized papers, books and records of petitioner and without permission of petitioner removed the books, papers and records from the offices of petitioner and made a list of petitioner's clientele and turned over to competitors of petitioner a list of his customers and called upon said customers and intimidated and threatened said customers and asked said customers to cease business dealings with petitioner (Record 58 and 59).
>
> 2—Respondents, through their agents, caused the customers of petitioner to appear before agents of respondents with extraordinary swiftness and to bring with them all papers and correspondence had with petitioner and said customers were handed statements prepared by respondents' agents—these statements containing false allegations and which were known by respondents to be false—and said customers were thereupon induced to sign such false statements (Record 60).

3—At a hearing ordered by respondents false evidence—and known by respondents to be false—was offered against petitioner and petitioner was denied opportunity to offer matters of refutation and was not given an opportunity to offer testimony in his own behalf, and had petitioner been given such opportunity he would have been able to rebut and contradict and thoroughly disprove all such false allegations (Record 61).

4—The defendant, John L. Flynn, threatened an employee of petitioner with bodily harm if such employee testified on behalf of petitioner (Record 61).

5—The defendant, John L. Flynn, entered uninvited a private conference of petitioner held at the Biltmore Hotel in New York and was in a state of almost total intoxication and proceeded to gloat over the apparent success of conspiracy entered into against petitioner and proceeded to relate the details of the unlawful conspiracy and the part each conspirator was to play and the said Flynn then proceeded to order various drinks of intoxicating liquor, without permission of petitioner, and proceeded to charge same to the petitioner and while in a state of intoxication physically assaulted a member of petitioner's staff (Record 62).

6—The defendant Burns wrote a letter over his official signature addressed to a client of petitioner saying in part "It is my advice that you take immediate steps to get your money back from Jones" (Record 63). At this time no issue had been adjudicated between petitioner and the Securities and Exchange Commission.

7—Defendant Kennedy at a social evening with a lady client of petitioner's stated to her that the respondents had "closed" the offices of petitioner and that petitioner "was not allowed to sell oil royalties any more" (Record 63). These allegations were false and known by Kennedy to be false.

8—Defendant Rabell approached petitioner and offered to reveal to petitioner the full details of the conspiracy for the sum of $27,500 (Record 64). The defendant Rabell did reveal to petitioner certain details of the conspiracy and petitioner discoursed with

said Rabell for the sole and only purpose of determining the full workings of the conspiracy and acting under advice of counsel arranged for the said Rabell to visit petitioner at his home in Scarsdale, New York, and defendant did then and there accept marked money as payment on account of his $27,500 demand and the said defendant Rabell upon orders and instructions of petitioner was arrested by officers of the law as he attempted to flee with the money (Record 64).

9—Within a few minutes after the arrest of defendant Rabell the defendant Burns was found concealed on the premises of petitioner at Scarsdale, New York, and running toward counsel of petitioner breathless and coatless said "how far am I involved in this Fischbach" (Record 64).

10—The defendant Landis made a statement to the effect that defendants did not "have anything on Jones but we are going to get that guy" (Record 66).

11—The respondents through their agents threatened and intimidated and interfered with the civil rights of petitioner when he sought to publish his book "And So They Indicted Me" (Record 69).

A motion to strike was filed by the respondents (Record 74 and 75) and after argument it was granted. The district court gave petitioner the right to amend again but petitioner elected to stand upon his second amended complaint and thereupon appealed to the United States Court of Appeals for the District of Columbia. That court affirmed the judgment of the district court (Record 90). A petition for rehearing was denied on April 26, 1941 (Record 90).

A second point involved in this petition is the right of government counsel to appear on behalf of respondents who are sued in their private capacities. It is our contention that in the absence of specific statutory authority permitting representation by government counsel that the respondents would have to engage private counsel. The district court ruled against our contention and its action was upheld by the court of appeals.

REASONS FOR GRANTING THE WRIT.

1—The United States Court of Appeals for the District of Columbia has not given proper effect to the opinion of this court in *Spalding* v. *Vilas*, 161 U. S. 483.

2—It is necessary for this court to again inquire into and re-examine the scope of immunity given officers of the government and to what extent they are protected by the authority of their offices when they go far beyond the duty vested in them by law.

3—The United States Court of Appeals for the District of Columbia seems to be undecided and in doubt as to the scope of governmental immunity when the opinion of this case is considered with the opinion of that same court in *Glass* v. *Ickes* decided by that court on August 26, 1940, and *Colpoys* v. *Gates* decided by that court on January 27, 1941.

4—This court has stated in *Spalding* v. *Vilas*, 161 U. S. 483, that officers of the government are not immune from suit if the acts done "were palpably or manifestly beyond the scope of their official duties." The court below therefore ignored the plain mandate of this court.

5—The United States Court of Appeals for the District of Columbia did not give proper effect to the opinion of this court in *Robertson* v. *Sichel*, 127 U. S. 507.

6—The United States Court of Appeals for the District of Columbia was in error in holding that members of the legal staff of the United States Government could appear for respondents when they are sued in their private capacities.

CONCLUSION.

Wherefore your petitioner prays that this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia be granted.

Respectfully submitted,

JAMES J. LAUGHLIN,
National Press Building,
Washington, D. C.,
Counsel for Petitioner.

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JOSEPH P. KENNEDY, JAMES M. LANDIS, GEORGE C. MATHEWS AND ROBERT E. HEALY, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

OPINIONS BELOW.

The district judge handed down no opinion. The opinion of the United States Court of Appeals for the District of Columbia is reported in 121 F. 2d, page 40. It appears in the record, pages 84 to 89.

JURISDICTION.

The opinion of the United States Court of Appeals for the District of Columbia was filed on March 17, 1941. A petition for rehearing was denied April 26, 1941. This court has extended the time for filing petition for a writ of certiorari to September 4, 1941. The jurisdiction of this court is invoked under Section 240(2) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938).

QUESTIONS PRESENTED.

A statement of the questions presented appears in the petition.

STATUTES AND OTHER AUTHORITIES INVOLVED.

The other statutes involved and the authorities pertinent to the points herein raised are shown in the appendix.

STATEMENT OF THE CASE.

A statement of the case has been given under that heading in the petition. For the sake of brevity that statement is not repeated here.

SPECIFICATIONS OF ERRORS TO BE URGED.

The United States Court of Appeals for the District of Columbia erred in holding that the allegations of the second amended complaint were not sufficient to require the respondents to answer and stand trial.

The United States Court of Appeals for the District of Columbia was in error when it held that the acts alleged to be committed by the respondents were not "palpably and manifestly beyond the scope of the official duties" of the respondents.

The United States Court of Appeals failed to give proper effect to an applicable decision of this court.

The United States Court of Appeals erred in holding that respondents, even though sued in their private capacities, could be represented by attorneys in the service of the United States.

ARGUMENT.

The United States Court of Appeals for the District of Columbia Erred in Holding That the Allegations of the Second Amended Complaint Were Not Sufficient to Require the Respondents to Answer and Stand Trial.

The right to maintain an action against public officers who act beyond the scope of their official authority has always been a troublesome question. This court has not spoken on this subject since *Spalding* v. *Vilas*, 161 U. S. 483. We believe that the time has now come for this court to re-examine and reinquire into this vital matter to the end that justice may be done. We believe that this is a case that calls for corrective action by this court. We endeavor therefore to assemble the pertinent cases dealing with this most important question.

At the outset it is necessary to recognize the established principle of law that public officers acting within the scope of their official duties are immune from suits at law for damages. We find in *Cooper* v. *O'Connor*, 69 D. C. App. 100, 99 F. 2d 135:

> "It may be argued persuasively that all public officers should be required to answer a declaration such as that of appellant and respond on the merits; but the courts have been unwilling to go so far. The situation is one in which there is a serious conflict between considerations of public policy; one, the protection of the individual citizens against oppressive official action, and the other, the protection of the whole people by protecting their officers against vindictive and retaliatory damage suits in order to insure their fearless and effective administration of the law." Citing *Randall* v. *Brigham*, 7 Wall. (U. S.) 523, 536 *et seq.*

And in the same case the court said:

> "There is a general rule that a ministerial officer who acts wrongfully although in good faith is nevertheless liable in a civil action and cannot claim the immunity of the sovereign. There is also a general rule, that if any officer—ministerial or otherwise—acts outside the scope of his jurisdiction and without authorization of law he is liable in an action for damages for injury suffered by the citizen as a result thereof." Citing *Bradley* v. *Fisher*, 13 Wall. (U. S.) 335, 351-352.

Therefore in our amended complaints it was necessary for us to show that the respondents, and each of them, were guilty of "*acts outside the scope of his jurisdiction and without authorization of law.*" We believe that the test laid down by the Supreme Court of the United States in *Spalding* v. *Vilas*, 161 U. S. 483, as to whether the acts complained of "were palpably or manifestly beyond the scope of their official duties" is applicable here. Of course if what the respondents did, they had a perfect right to do and they did in good faith and acted within the proper limits of the law and the authority conferred upon them, and injury resulted to the appellant, then no right of action would accrue to petitioner. As to whether the acts complained of "were palpably or manifestly beyond the scope of their official duties" can be determined only by reading the allegations contained in the complaint filed in the court below. We believe that only casual reading of the various complaints will show that the respondents entered into a conspiracy to destroy petitioner and that their acts were entirely outside the scope of their official duties and were malicious and wilful.

It must never be forgotten that this court, in *Jones* v. *Securities and Exchange Commission*, 298 U. S., page 1, upheld the contentions of the petitioner and delivered a stinging rebuke to the respondents and used perhaps the strongest and most caustic language that ever came from

this court and directed to a department of the government. In the Jones case this court said:

> "The action of the commission finds no support in *right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest * * * that this shall be a government of laws* * * because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning.
>
> The admonition of Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, 635, should never be forgotten when he said:
>
> > 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and sly deviations from legal modes of procedure. * * * It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *Obsta Principiis.*' "

This court further said in the Jones case:

> "Arbitrary power and the rule of the constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict.
>
> To borrow the words of Mr. Justice Day * * * 'There is no place in our constitutional system for the exercise of arbitrary power.' " Citing *Garfield* v. *Goldsby*, 211 U. S. 249, 262.

Petitioner alleged in his complaint filed in the court below that the respondents were engaged in a general "fishing expedition" when the respondents without any authority of law searched his private papers. This court in the Jones case upheld his contention in this respect when this was said in the opinion:

> "Nothing appears in any of the proceedings taken by the commission to warrant the suggestion that the investigation was undertaken or would be carried on for any other purpose or to any different end than that specifically named. A final inquisition to compel disclosures of fact is not an end but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. The citizen when interrogated about his private affairs has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer. Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement the power of the commission to proceed with the inquiry necessarily came to an end. Dissociated from the only ground upon which the inquiry had been based and no other being specified, further pursuant of the inquiry obviously would become what Mr. Justice Holmes characterized as a 'fishing expedition' * * * for the chance that something discreditable might turn up." Citing *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445.

And this court said further in the Jones case:

> "If the action here of the commission be upheld, it follows that production and inspection may be enforced not only of books and private papers of the guilty, but those of the innocent as well, notwithstanding proceeding for registration so far as the power of the commission is concerned has been brought to an end by the complete and legal withdrawal of the registration system."

It is apparent that the Supreme Court, due to the strong language used in its opinion, believed that the re-

spondents were acting far beyond the scope of their authority. We cannot lightly disregard the statement in the opinion that the action of the appellees found no support "in right principle or in law." In other words it must have been apparent that they exceeded their authority and their action was malicious and was wilful. As to the proper definition of the words "right principle" it is only necessary to refer to the ordinary dictionary definition.

In *LeRoy* v. *Tatham*, 14 How. 156, it was stated that principle was a "fundamental truth."

Petitioner well realizes the difficulties confronting him in preparing a complaint that would come within the language of the opinion of *Cooper* v. *O'Connor, supra,* and on that account and also due to the fact that it was alleged that a conspiracy was entered into between the respondents it was necessary to set forth the various links in the chain forming the conspiracy in considerable detail. We believe this to be essential. In 12 C. J. 630, Sec. 216, we find:

> "In an action for conspiracy the rule is to allow great latitude in setting out in the complaint the particular acts from which the conspiracy is to be inferred, even going so far as to allow the individual acts of the conspirators to be averred."

In *Morse* v. *Lewis*, 54 F. 2d 1027, the court said:

> "Conspiracy should be alleged with such particularity as to show unlawful agreement between parties charged."

In *Stoner* v. *Wilson*, 140 Kan. 383, 36 Pac. 2d 999, the court said:

> "From the above-mentioned cases and texts and others which might be cited to the same general effect, it is decided that the mere charging of the conspiracy without stating the facts and circumstances

which warrant recovery against the claimed conspirators is not sufficient and in order that the petition state a cause of action the acts of the parties from which it follows or may be inferred that there was a conspiracy, must be alleged as well as the facts showing that as a result the plaintiff suffered damages for which he is entitled to recover."

Since respondents in the court below raised the objection that the complaint was too *detailed* it is believed that attention should be called to the general rule as to allegations necessary in a complaint alleging conspiracy.

With respect to the action of the respondents which this court denounced in such unmistakable language it is believed that the dissenting opinion of Justice Brandeis in *Olmstead* v. *United States*, 277 U. S. 438, has application here:

"Decisions of this court applying the principle of the *Boyd Case* (116 U. S. 616) have settled these things. Unjustified search and seizure violates the fourth amendment, whatever the character of the paper; whether the paper when taken by the federal officers was in the home, in an office or elsewhere, whether the taking was effected by force, by fraud, or in the orderly process of a court's procedure. From these decisions, it follows necessarily that the amendment is violated by the officer's reading the paper without a physicial seziure, without his even touching it; and that use, in any criminal proceedings, of the contents of the paper so examined—as where they are testified to by a federal officer who thus saw the document or where, through knowledge so obtained, a copy has been procured elsewhere—any such use constitutes a violation of the fifth amendment.

The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognize the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain,

pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the fourth amendment. And the use, as evidence, in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the fifth." * * *

"And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but with understanding * * * decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be in peril if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites anarchy. To declare that in the administration of the criminal law the end justified the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

It would be interesting to note in view of Justice Brandeis' decided opinion as to a citizen's civil rights just what view he would take of the situation as found in the record at pages 57 to 69.

In *Leong Yau* v. *Carden*, 23 Hawaii 362, 369 (no other citation), the court, after explaining the general rule as to the immunity of public officers, said this:

> "But if he prosecutes without probable cause and with malice he certainly is in no better position than the judge of the court * * * superior or inferior * * * he proceeds maliciously and without any jurisdiction or the head of an executive department who acts maliciously and without color of authority. Public prosecuting officers are entitled to protection against claims growing out of the discharge of their duties done in good faith though with erroneous judgment, but private individuals are entitled to the protection of the law against any conduct of such officers which is at once reckless, malicious and damaging."

In *Schneider* v. *Shepherd*, 192 Mich. 82, 158 N. W. 182, the prosecuting attorney directed the chief of police of Detroit to raid a certain house and arrest the inmates and bring them to police headquarters. This was done upon strength of the report made to him by a private investigator that the place was a disorderly house. It was in fact the home of a reputable citizen who had lived there thirty years. In the suit for false arrest the court said:

> "The investigation of alleged crimes by the prosecuting attorney through private individuals finds no statutory sanctions. If he proceeds upon such a course of action he does so at the same peril as does the unofficial citizen; as this is not a cloak to protect him from liability or a wrong thereby resulting to the innocent person subjected to a false arrest. The statute affords no such robe of immunity nor grants any such power."

It is plain that when a study is made of the allegations contained in the various complaints filed in the district court by petitioner that the conclusion is inescapable that the appellees were not content to perform the work entrusted to them by law but went far beyond the

scope of their official duties. It is difficult to understand how the court below could hold that the respondents were immune from suit when the complaint contained an allegation such as this (Record 59):

> "Plaintiff further alleges that after the defendants gained possession of plaintiff's books, records and files as a result of the unlawful seizure and forcible removal above referred to conspired, combined, agreed and confederated among themselves and with each other to obtain a list of plaintiff's business customers, and did from plaintiff's own books, records and files obtain a list of plaintiff's clients and did thereupon initiate a campaign of abuse and intimidation against said clientele in an effort to shatter and destroy the confidence that said clientele did repose in said plaintiff by sending or causing to be sent to said clients telegrams commanding said clients to appear before said defendants or their agent or agents and bring with them all correspondence, literature and records of their transactions with said plaintiff.

And if there is any doubt as to whether such an activity on the part of respondents would shield them from an action for damages let us consider Paragraph 29 (Record 59):

> 'Plaintiff further alleges that following the dispatch to members of his clientele of such telegrams and in furtherance of said unlawful conspiracy the defendants acting maliciously and without just or probable cause and acting palpably or manifestly beyond the scope of their official duties, the defendants conversed with the members of plaintiff's clientele who came in response to said telegrams, and acting maliciously made false statements with respect to plaintiff and plaintiff's business operations such as "We are going to close Jones' business" and "you had better sue Jones and get your money back" * * *.'

Certainly it could hardly be contended that such activity as this would come within the lawful scope of respondents' authorities as officers of the United States Government. Let us carry it then a step fur-

ther if there any doubt still remains and refer again to Paragraph 31 (Record 60):

> 'Plaintiff further alleges that the defendants, in furtherance of this unlawful conspiracy and acting palpably or manifestly beyond the functions of their office and in an effort to destroy the business of plaintiff, did turn over to plaintiff's competitors the names and addresses of plaintiff's clientele—the names and addresses having been acquired by defendants as a result of said unlawful seizure and forcible removal of plaintiff's books, records and files—and plaintiff's competitors after obtaining the names of plaintiff's clientele immediately began to solicit and prey upon said customers and did thereby induce many of plaintiff's customers to cease business dealings with plaintiff and to deal with plaintiff's competitors * * *.'

It must be apparent that respondents were certainly going wholly beyond the duties of their official stations and in so doing were carrying out the plans of the unlawful conspiracy. Let us refer again to Paragraph 33a (Record 61):

> 'When said unlawful hearings were in progress defendant Flynn made threats to certain of plaintiff's staff; when plaintiff's auditor was waiting in an anteroom to be called as a witness, the defendant Flynn in a threatening and menacing manner said to said auditor—"I am going to get you for this after this hearing is over."'"

There are other instances more striking than those already referred to which illustrate the means used by the participants in this unlawful conspiracy, for instance, we find in Paragraph 35 (Record 63):

> "Plaintiff further alleges that the defendant Kennedy without just or probable cause and acting palpably and manifestly beyond his official functions at a social meeting with a wealthy lady client of plaintiff

wilfully and deliberately misled and deceived said client by representing to said client that the Securities and Exchange Commission had 'closed' the offices of said plaintiff and that said plaintiff was 'not allowed to sell royalties any more,' which statement by said Kennedy was false and known by said Kennedy to be false; that said statement was made without just or probable cause and was malicious and was palpably and manifestly beyond the official functions of said Kennedy; that as a result of this false statement the said lady client did thereupon institute a civil suit in the Municipal Court of the County and City of New York for the recovery of her money invested with said plaintiff; this unlawful act on the part of said Kennedy and which was a part of said conspiracy which had for its object the destruction of plaintiff's business caused great damage to plaintiff in as much as the said lady client upon the strength of false statements made by said defendant Kennedy severed her business dealings with said plaintiff; in addition the plaintiff was put to the trouble and expense of defending said suit in court. It must also be remembered that at the time the false statement was made by the defendant Kennedy that no issue had been adjudicated between the defendants and plaintiff."

It is difficult to conceive how anyone would attempt to justify such conduct on the part of an official of the government as that set forth in Paragraph 35 (Record 63) involving respondent Kennedy, and we cannot overlook the conduct on the part of the respondents as set forth in Paragraphs 36 and 37 (Record 64-66), where an attempt was made by one of the respondents to solicit a bribe from the petitioner with an offer to reveal and expose all the misconduct practiced by the respondents in furtherance of this unlawful conspiracy. There is no question that this actually happened and proper records will verify this fact. Would anyone say that such conduct would come within the legitimate scope of the official duties of a public officer of the United States?

Let us consider briefly the allegations contained in Paragraph 38 (Record 66) which states:

> "Plaintiff further alleges upon information and belief gained from a telephonic conversation had with a high official of the Federal Government, which telephonic conversation was dictographically recorded, that defendant Landis in conversation at Washington, D. C., during the time herein referred to stated categorically that defendants did not 'have anything on' said plaintiff but that said defendants were 'going to get that guy' * * *."

Would anyone say that such conduct on the part of a public officer of the United States Government is within the scope of his official action. As was pointed out in *Cooper* v. *O'Connor, supra,* which sets forth the following:

> "The situation is one in which a serious conflict arises between considerations of public policy—one, the protection of the individual citizen against oppressive official action, and the other, the protection of the whole people by protecting their officers against vindictive and retaliatory damage suits in order to insure that fearless and effective administration of the law."

We believe the language of the court in *Fidelity and Casualty Company, New York,* v. *Brightman,* 53 F. 2d 161, C. C. A. 8 (1931), has some bearing, in that case the court said:

> "The Missouri rule is in line with the general run of authority that a public officer charged with discretionary duties is not liable for a mistake of judgment or an erroneous performance of said duties unless he be guilty of wilful wrong in relation thereto, but as to the ministerial duties he is liable for the violation or neglect thereof, to the party injured thereby, and that a mistake of judgment does not excuse him.

Citing *Cook* v. *Hecht,* 64 Mo. App. 273 (no other citation), which said:

> 'They are not liable so long as they honestly and in good faith perform the work entrusted to them * * *.' "

In the case of *Rowe* v. *Lunstrom*, 57 Pac. 2d 1128, 89 Utah 520, the court said:

> "It is often asserted that where a public officer is by law vested with discretionary ministerial powers and *acts within the scope of his authority* he is not liable in damages for an error in judgment unless guilty of corruption or wilful violation of the law. *He may not however claim immunity for the commission of an act entirely outside the scope of his official duties.*"
>
> See, also, *Schooler* v. *Arrington*, 106 Mo. App. 607, 81 S. W. 469.

It is difficult to understand the opinion of the court of appeals. If this opinion is permitted to stand then the cause of personal liberty in this country will sustain a setback that will take a half century of years to erase. Unless this court reverses the judgment of the court of appeals then the citizen of this country must be at the mercy of an official of an administrative agency. Or to make this stronger and to say it in another way we need only borrow the words of Mr. Justice Sutherland in *Jones* v. *Securities and Exchange Commission, supra*, when he said:

> "* * * that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant to detect and turn aside the danger at its beginning. * * *"

It is also difficult to reconcile the opinion of the court of appeals in the light of the concurring opinion of Chief Justice Groner in the case of *Glass* v. *Ickes*, 117 F. 2d,

p. 273, 73 Ct. App. In the Glass case the complaint was based upon a press release issued by the Secretary of the Interior and it was conceded by Glass that the matters contained in the press release were in the main true. That was the sum and substance of the case and yet Chief Justice Groner was inclined to be in doubt as to the correctness of the court's ruling. His dissenting opinion said this:

> "The importance of the principle involved induces me to express my views separately. The opinion, I think, correctly states the rule of privilege applicable to an official of the government. * * * The necessity for the rule is obvious but its cloak of absolute immunity offers such far-reaching opportunity for oppression that it manifestly ought not to be extended beyond the impulse that gave it being."

and he then said this:

> "On the other hand it is quite true that both in this court and the Supreme Court the scope of official authority has been so broadly stated that I am unable to say that the secretary's press release was not in view of the general authority of the secretary concerning the oil industry a matter in 'relation to matters committed by law to his control.' And in this view I am impelled to concur in the opinion, though in doing so I express with great deference the fear that in this and previous cases we may have extended the rule beyond the reasons out of which it grew and thus unwittingly created a privilege so extensive as to be almost unlimited and altogether subversive of the fundamental principle that no man in this country is so high that he is above the law."

When one considers the allegations in the Glass complaint and the allegations in the complaint of petitioner then the reasoning of the court of appeals is difficult indeed to reconcile.

In this connection we also refer to *Colpoys* v. *Gates*, 118 F. 2d, p. 60, 73 Fed. C. T. App. , where the question of government is involved.

In the opinion of the court of appeals we find this:

> "Similarly the carrying out of investigations and the turning over of evidence to the attorney general for presentation to a grand jury come under the authorized duties of the commission. And likewise, plaintiff has not met in these allegations the task of showing acts which fall outside of the immunity."

We find no fault with this. However, our complaint alleges that the respondents turned over to the grand jury false evidence and which they knew to be false. Of course, such a course of conduct would be "palpably and manifestly beyond the scope" of their official duties.

In the opinion of the court of appeals it was stated that the respondents would not be responsible for the acts of their subordinates. The opinion relied on *Robertson* v. *Sichel*, 127 U. S. 507. We submit that the court of appeals did not give proper effect to the opinion of this court in the Sichel case. We have alleged that the respondents were aware of the activities of the subordinates and counseled and directed them as to their part in the conspiracy. We find in 23 American & English Encyclopedia of Law (2d Ed.) 382, the following:

> "It is a well-settled rule that a public officer is not responsible for the acts or omissions of subordinates properly employed by or under him if such subordinates are not in his private service but are themselves servants of the government unless he has directed such acts to be done or has personally cooperated in the act of negligence."

We find in *Fidelity and Casualty Co. of New York* v. *Brightman*, 53 F. 2d 161, the following:

> "It is well settled that public officers are not responsible for acts of subordinate officials, if such subordinates are themselves employees of the government, where there is no negligence on the part of such public officials in employing them unless the superior officer has directed or encouraged or rati-

fied such acts or has personally co-operated therein," citing *Michel* v. *Smith*, 188 Calif. 199, 205 Pac. 113; *Dowler* v. *Johnson*, 225 N. Y. 39, 121 N. E. 48, 3 A. L. R 146; *Barker* v. *C., P. and St. L. R. R.*, 243 Ill. 482, 90 N. E. 1057, 26 A. L. R. (N. S.) 1058, 134 Am. St. Rep. 382."

We say therefore that the test is whether the public officer:

> "Has directed or encouraged or ratified such acts or has personally co-operated therein."

In the instant case there is not the slightest doubt as to the knowledge of respondents Kennedy and Landis. If we look at it from another angle would there be any particular reason or motive for defendants Burns, Flynn and Rabell from carrying out their part of the conspiracy if there was not some superior hand guiding their course of conduct. Of course if in this case we had only the acts of the subordinates and nothing as to Kennedy and Landis then the ruling of *Robertson* v. *Sichel* would clearly apply. In the instant case we say therefore that the respondents Kennedy and Landis are clearly responsible for the acts of Burns, Flynn and Rabell—who participated in one of the most disgraceful episodes in our history. Looking ahead we say that no reasonable prudent juror after reading the various paragraphs of the complaint could conclude that Kennedy and Landis were not aware of it—did not approve it—and did not personally participate in it.

At page 5 of the opinion of the court of appeals reference is made to the action of the commissioners who through Flynn threatened and intimidated the publisher to whom petitioner had submitted his manuscript for publication of his book. It is difficult to follow the reasoning of the court in this regard. Petitioner had a right to submit his material to any publisher and had a right to proceed unmolested. No one had a right to interfere with the free exercise of his civil rights. And in this connec-

tion it must never be forgotten that Section 51, Title 18, United States Code, is still on the books. It is in full force and effect—living, breathing every hour. It provides:

> "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or the laws of the United States, or because of his having so exercised the same * * * with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years. * * *"

Of course this law is being enforced every day. And in this connection it seems permissible to state that had petitioner done any of the things that Flynn had done or Landis or Kennedy—or Rabell or Burns he would have most certainly been called to account. Suppose for the sake of argument that petitioner had attempted (in conjunction with one of his employees) to intimidate, threaten or browbeat one of his investors who stated he was going to make a complaint to the securities and exchange commission. If such a thing happened would there be any doubt in the mind of anyone that petitioner would have had to face a criminal prosecution. It goes without saying that it must be apparent that interference with the civil rights of a citizen must be "palpably and manifestly" beyond the scope of the official duties of an official of the government.

The Right of Attorneys in the Employ of the Government and Paid by the United States Treasury to Appear on Behalf of Respondents Who Are Sued in Their Private Capacities.

Petitioner contends that Chester T. Lane, George A. McNulty and Robert E. Kline, Jr., who are attorneys in the employ of the United States Government, have no right to appear in this case on behalf of the respondents

who are sued in their official capacities. In our judgment a very serious question arises in this case since the respondents are sued in their private capacities and there is no authority justifying the United States Government expending public money in the defense of such suit. We believe that the ruling in *Booth* v. *Fletcher*, 101 F. 2d 678, 69 D. C. App. 351, is not determinative of this question.

In the Fletcher case the litigants were represented by certain officers of the United States Government in accordance with existing law. In the Fletcher case this court pointed out that Sections 309 and 316, Title 5, United States Code Annotated, provided for representation by the attorney general or certain representatives of the Department of Justice, but it is our view that such representative must be specifically authorized by statute.

In the case of the respondents Messrs. Kline, McNulty and Lane were appointed attorneys for the Securities and Exchange Commission by virtue of the Act of June 6, 1934 (Section 78A, Title 15, United States Code Annotated). That particular section provides:

> "The commission is authorized to appoint and fix the compensation of such officers, attorneys * * * as may be necessary for carrying out its functions under this chapter."

The attorneys above referred to draw their salaries from the public treasury and their duty is to the government and they are not permitted to come into court except on behalf of the Securities and Exchange Commission. They cannot appear in the court in a private capacity.

Objection was made in the court below to the appearance of these attorneys but the objection was overruled. Petitioner believes it was essential that he challenge the authority of such representation.

In the case of *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, the Supreme Court, speaking through Justice Sutherland, said:

> "The trial court of this court has power at any stage of the case to require an attorney or one of its officers to show his authority to appear."

Citing *The King of Spain* v. *Oliver*, 2 Wash. C. C. 429, where Mr. Justice Washington, sitting in the circuit court, said:

> "It would be strange if a court whose right and whose duty it is to superintend the conduct of its officers should not have power to inquire by what authority an attorney of that court undertakes to sue the defendant in the name of another—whether that other is real or fictitious—and whether its process is used for the purpose of vexation or fraud instead of that for which alone it is intended. The only question can be as to the time and manner of calling for the authority and as to the remedy, which are in the discretion of the court and ought to be adapted to the case."

Petitioner contends that it is essential that proper representation be had in the case. We find in *Reynolds* v. *Fleming*, 30 Kan. 106, 1 Pac. 61, and *G. W. Mining Company* v. *Woodmas*, 12 Colo. 46, 20 Pac. 771, the following:

> "A judgment resting on the authorized appearance of an attorney is absolutely void."

* * * * * * *

and it is submitted therefore that the attorneys in the employ of the United States Government have no right to appear on behalf of the respondents and we say that the holding of the court below was error and should be reversed.

It is believed that the facts set forth in the various complaints filed by petitioner in the court below are matters of considerable moment and if unchecked constitute a real threat to civil liberty in the United States. It is doubtful indeed if after a careful, thorough and painstaking examination of authorities that any case decided by this court since its foundation will reveal that this tribunal ever used language so denunciatory as that used in the opinion *Jones* v. *Securities and Exchange Commission, supra.* When this court characterized the conduct of respondents as one

"having no support in right, principle or in law"

that court must have been truly alarmed over the activities and the grave peril of liberty, if the activities of respondents were not checked.

We cannot overlook what was said in the case of *The United States* v. *Lee,* 106 U. S. 196:

> "No man in this country is so high that he is above the law. No officer of the law may state that law at defiance with impunity. All the officers of the government from the highest to the lowest are creatures of the law and must obey it."

Petitioner is not unmindful of the great difficulty confronting him in preparing a complaint that will come within the rule laid down by this court, but it is believed that the complaints filed in the courts below do measure up to the test required in *Cooper* v. *O'Connor, supra,* and that the demurrer should have been overruled, the motions to dismiss should have been denied and the respondents required to answer and stand trial so that the petitioner would be permitted to have a jury of his peers pass upon the merits of his allegations as law and justice requires.

In conclusion it suffices to say that each passing day brings to our mind the realization that we must be con-

stantly on guard against any encroachment upon the rights of the citizen. As was recently said by Granville Clark, chairman of the American Bar Association's Committee on the Bill of Rights:

> "World events are bringing the people of America to the realization that the freedom which we enjoy is disappearing in a large part of the world. These events have fortunately brought about a new concern for the safeguarding of American liberties and institutions.
>
> On the other hand they have produced new tensions and intolerances. It is an opportune time to remind the legal profession and the general public to be on their guard against the impairment of any of the basic rights of Americans."

What happened to petitioner can happen to any citizen of the United States unfortunate enough to incur the ill will of a dictatorship in the guise of law enforcement. It must be checked at its source. The maxim of the tyrant "might makes right" must not again occur in this country. The policy of "rule or ruin" must gain no foothold in our system of government. Equal justice under law must be ever the rule in our country.

It follows from what has been said that the petitioner has definitely made out a case and the action of the court below in dismissing his complaint was error and the judgment should therefore be reversed and the cause remanded to the district court for further proceedings.

It must never be forgotten what was said by this court in *United States* v. *Lee*, 106 U. S. 196:

> "No man in this country is so high that he is above the law. No officer of the law may state that law at defiance with impunity. All the officers of the government from the highest to the lowest are creatures of the law and must obey it."

Petitioner well realizes that the allegations made by him are very serious indeed. The allegations of miscon-

duct are far-reaching in scope and most certainly cast grave doubt on the honesty and integrity of certain officials of the government. The petitioner merely asks that he be given his day in court—that he be given an opportunity to prove his allegations—which he can do beyond any question of a doubt. Of course, if petitioner does not support his contentions he cannot recover. Petitioner is well aware of this. It would seem that the respondents should be anxious and willing to remove from their names the stigma of the charges made in the allegations of the complaint and should welcome an opportunity to rebut and contradict the charges in open court. It would seem that it would be in the interest of justice to require the respondents to answer this complaint and to stand trial. If they are innocent of the charges they have nothing to fear in a court of law.

Conclusion.

In conclusion it is respectfully submitted that a writ of certiorari to the United States Court of Appeals for the District of Columbia should be granted.

JAMES J. LAUGHLIN,
National Press Building,
Washington, D. C.,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 585

J. EDWARD JONES, PETITIONER

v.

JOSEPH P. KENNEDY, JAMES M. LANDIS, GEORGE C. MATHEWS, AND ROBERT E. HEALY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The District Court did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 84–89) is reported in 121 F. (2d) 40.

JURISDICTION

The judgment of the Court of Appeals was filed on March 17, 1941 (R. 90). A petition for rehearing was denied on April 26, 1941 (R. 90–91). The petition for a writ of certiorari was filed on

September 4, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the facts alleged in the complaint charge respondent members of the Securities and Exchange Commission with acts palpably beyond the scope of their official duties, and, if so, whether such alleged acts are tortious.

2. Whether respondents are liable in damages for acts of their subordinates not directed or approved by them.

3. Whether attorneys for the Securities and Exchange Commission may represent members of the Commission when sued as individuals for acts performed in their official capacity.

STATEMENT

This case was decided by the District Court upon respondents' motion to dismiss petitioner's second amended complaint.[1] The District Court granted this motion (R. 76–79) and the court below affirmed (R. 90). The allegations of the complaint may be summarized as follows:

The respondents are the four persons who, at the time of the actions alleged in the complaint, were

[1] This second amended complaint was filed by leave of the District Court after two earlier complaints (R. 1–8, 15–50) had been dismissed for failure to state a claim upon which relief could be granted.

the incumbent members of the Securities and Exchange Commission, an independent agency of the Federal Government established by Section 4 (a) of the Securities Exchange Act of 1934 (48 Stat. 881, 15 U. S. C. §§ 78 a–jj) to administer that Act and the Securities Act of 1933 (48 Stat. 74, 15 U. S. C. §§ 77 a–aa). Also named as defendants in the complaint are Burns, Flynn and Rabell, former employees of the Commission. These defendants, however, were not served and are not now before the Court.[2]

The complaint alleges that certain acts of the respondents undertaken by them in purported exercise of their official duties were in fact part of a conspiracy to destroy petitioner's business for the purpose of vindicating the Honorable Harold L. Ickes, Secretary of the Interior, with whom petitioner had been engaged in a dispute (R. 57–58). To the charges involving purported official acts of the Commission, the complaint adds allegations regarding allegedly improper acts, "in furtherance of said conspiracy", by individual Commissioners, and by Burns, Flynn and Rabell.

The purportedly official acts of the Commission alleged to have been part of the conspiracy revolve around a stop order proceeding instituted by the Commission in which the petitioner was

[2] There is no foundation whatever, in the record or otherwise, for petitioner's assertion that these defendants "evaded service of process" (Pet. 8).

named as respondent (R. 69–71). The facts relating to that proceeding are these:[3] In May 1935 petitioner filed with the Commission under the Securities Act of 1933, a registration statement covering an issue of investment trust certificates which he proposed to offer to the public. Absent amendment or action by the Commission, this statement would have become effective on the twentieth day after it was filed. On the nineteenth day, the Commission notified petitioner of the institution of stop order proceedings, based upon a charge that the statement contained material misrepresentations and omissions. Before the hearing to determine whether the stop order should issue, the Commission issued a *subpoena duces tecum*. Instead of complying, Jones appeared by counsel at the hearing and sought to withdraw his registration statement. A rule of the Commission provided for withdrawal upon consent of the Commission; the Commission did not consent. At a later hearing Jones again appeared by counsel and moved for orders permitting withdrawal and dismissing the proceeding. The Commission denied these motions. A petition for review was dismissed by the Circuit Court of Appeals for the Second Circuit for lack of

[3] For purposes of the following description of the stop order proceeding, we refer not only to the allegations of the complaint but also to the recitals in the opinion of this Court in *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, an opinion referred to in the complaint and upon which petitioner strongly relies to establish his claim for relief.

jurisdiction. 79 F. (2d) 617, certiorari denied, 297 U. S. 705.

Jones having declined to comply with the *subpoena,* the Commission, as provided by the Act, applied to the United States District Court for the Southern District of New York for the requisite order compelling compliance. Judge Caffey of that court upheld the Commission's contention that the withdrawal was ineffective, and entered the requested order. 12 F. Supp. 210. The Circuit Court of Appeals for the Second Circuit affirmed Judge Caffey's action. 79 F. (2d) 617. On writ of certiorari this Court reversed the decisions of the lower courts. 298 U. S. 1.[4]

The complaint recites in detail the various actions of the Commission in the conduct of this proceeding, charging that the acts were done "maliciously," "wrongfully," "unlawfully," and "without support in right principle or in law" (see, e. g., R. 67, 68, 71, 72, 73). The individual Commissioners are alleged to have acted "maliciously," "without just or probable cause," and "wholly beyond the scope of their authority" (see, e. g., R. 58, 66, 67, 68, 69, 72).

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[4] Shortly after the decision of this Court, petitioner was indicted by a grand jury for the Southern District of New York on the basis of evidence gathered by the staff of the Commission. In the trial of this indictment, charging violation of the mail fraud statute, petitioner was acquitted (R. 68).

In addition to the purportedly official acts of the Commission, the complaint sets forth two isolated actions alleged to have been taken by respondents Kennedy and Landis in furtherance of the conspiracy.[5] Kennedy is alleged to have told one of petitioner's clients that the Securities and Exchange Commission had "closed" the offices of Jones and that he was not "allowed to sell royalties any more" (R. 63). Landis was alleged to have said to some unnamed person on the telephone that the respondents did not "have anything on" Jones but that they were "going to get that guy" (R. 66).

Several allegations are contained in the complaint concerning the actions of defendants Burns, Flynn, and Rabell, who were not served. There is no allegation, however, that these actions were taken under the direction or with the approval of the respondents.

The court below, in affirming the District Court's dismissal of the complaint, classified the acts alleged in the complaint in three categories: (1) activities of the Commission; (2) acts of Commissioners; and (3) acts of subordinates (R. 85–89). As to the first class, activities of the Commission, the court held, in accord with the doctrine of *Spald-*

[5] The complaint contains no allegation against respondents Mathews and Healy.

ing v. *Vilas*, 161 U. S. 483, that public officers when acting within the scope of their official authority are immune from suits for damages (R. 85), and that petitioner had not met the task of showing acts which fall outside of the immunity (R. 86). As to the second class of acts, those of individual Commissioners, the court held that the complaint failed as a matter of tort law, even in the absence of official immunity, to state any claim upon which relief could be granted (R. 87). As to the third class, acts of subordinates, the court held, in accord with *Robertson* v. *Sichel*, 127 U. S. 507, that the defendants could not be held liable for acts of their subordinates not alleged to have been done under their direction and approval (R. 88–89).

The court further dismissed petitioner's contention that Messrs. Lane, McNulty, and Kline, attorneys for the Securities and Exchange Commission, had no right to represent respondents Landis, Mathews, and Healy. No question was raised as to whether the appearance of Messrs. Lane, McNulty, and Kline had been authorized by the individual Commissioners, or by the Commission as a body; only the right of government attorneys to appear in such a case was challenged. The court confirmed this right.

ARGUMENT

1. This Court held in *Spalding* v. *Vilas*, 161 U. S. 483, that an executive officer of the Government is

immune from civil suits for damages arising out of acts done by him in the course of performing functions within the general scope of his authority, and that his immunity is forfeited only when he acts "in reference to matters which are manifestly or palpably beyond his authority." Petitioner does not challenge this established principle (Pet. 16–17); the primary question he seeks to have reviewed is simply whether the court below properly applied this principle to the particular facts alleged in the complaint. This question, peculiar to this particular case, does not present an issue of such general importance as to warrant review by this Court.

2. In any event, the decision below holding that the rule in *Spalding* v. *Vilas, supra,* applies to the principal allegations of the complaint is, we believe, manifestly correct. As pointed out in the Statement, the court below divided the allegations of the complaint into three categories; the first and by far the most important category is comprised of those allegations which relate to purportedly official acts of the Commission. It was those allegations which the court below dismissed upon the authority of the *Vilas* decision.

Stripped of adjectival surplusage, petitioner's case, insofar as it rests upon purportedly official acts of the Commission, may be summarized as follows: In 1934 the Commission began an investigation of Jones's sales of securities in interstate commerce; in connection therewith the Commis-

sion subpoenaed as witnesses a number of his customers; members of the Commission's staff examined his books and records and investigated to determine whether he was in fact violating the Act; the Commission issued announcements to the public as to the institution and progress of the investigation; on the basis of the evidence adduced in the investigation the Commission instituted an injunction suit, and the petitioner consented to the entry of a preliminary injunction (R. 58–59; Ex. D to complaint, pp. 124, 127).

After entry of the preliminary injunction Jones filed a registration statement; after an examination of this statement the Commission issued a notice of hearing to determine whether it was false or misleading or otherwise deficient; the Commission appointed examiners to conduct the hearing who were attorneys employed by the Commission; the Commission issued a *subpoena* directing Jones to testify at the hearing and to produce certain books and records; at the hearing Jones attempted to withdraw his registration statement; the Commission denied this request; shortly after the attempted withdrawal a new *subpoena* was issued which could not be served because Jones had left the city; the press was notified of this fact; thereafter Jones consented to service of the *subpoena* upon him; at the time set for his appearance he again attempted to withdraw his registration statement and refused to testify or produce docu-

mentary evidence; the Commission brought an action in the District Court for the Southern District of New York to enforce its *subpoena;* the district court ordered Jones to respond to the *subpoena,* this decision being affirmed by the circuit court of appeals; and their decision was reversed by this Court on certiorari (R. 69–73).

The evidence obtained by the Commission as to the sales of securities by petitioner was subsequently presented to a grand jury, which returned an indictment against petitioner for the fraudulent sale of securities; thereafter criminal proceedings were instituted against petitioner on the basis of said indictment; and he was acquitted by a jury (R. 68).

The recital of the foregoing facts is embellished in the complaint by a wealth of descriptive detail designed to lend color to an otherwise commonplace history of investigation and legal proceedings arising out of suspected violations of the law against selling securities by fraud. But this embellishment cannot obscure the fact that petitioner has recited in his complaint a course of conduct which falls clearly within the general scope of the authority vested in respondents by the Securities Act of 1933. Accordingly, under the established rule of *Spalding* v. *Vilas,* respondents are entitled to immunity from any claim for damages arising out of that conduct. It is immaterial that the acts are alleged to have been done "maliciously"; under the rule in the *Vilas* case, official action cannot give

rise to personal liability even though it be motivated by malice. 161 U. S. at 499.

To lend support to his contention that respondents' conduct was beyond the scope of their authority, petitioner relies upon isolated portions of this Court's opinion in *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1. As appears from the facts of that litigation recited in the Statement (*supra*, pp 4–5), the case involved only one narrow question of procedural law: whether Jones's attempted withdrawal of his registration statement was effective to deprive the Commission of further jurisdiction in the stop order proceeding. Mr. Justice Sutherland, speaking for the majority, held that since the stop order proceeding had been instituted before the registration statement became effective, Jones was in the position of an applicant for a license who might, prior to the granting thereof, withdraw his application at will. The failure of the Commission to allow the withdrawal was said to find "no support in right principle or in law" and was characterized as "wholly unreasonable and arbitrary." 298 U. S. at 23.[6]

Despite the language used by Mr. Justice Sutherland in his opinion, it is evident that petitioner

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[6] However, Mr. Justice Cardozo, dissenting, said (298 U. S. at 29): "A subpoena *duces tecum* was issued by the Commission on June 13 before any attempt had been made to withdraw the registration statement. On June 18, the day of the attempted withdrawal, there was issued a second subpoena commanding the registrant to appear and testify,

cannot find in that litigation any support for his position that respondents acted palpably beyond the functions of their office. At most, the decision of this Court establishes that the Commission, called upon to determine the extent of its own jurisdiction, decided that question erroneously. If this was error, it was a reasonable one, as is established by the fact that it was thought not to be error at all by the District Court, the Circuit Court of Appeals, and by Justices Cardozo, Brandeis, and Stone of this Court.[7] But reasonable or not, the mistake was one by a quasi-judicial body in making, in the first instance, an unavoidable determination of its own jurisdiction in a proceeding within the general scope of its authority. Stated otherwise, the erroneous action was taken by the respondents in the course of performing official functions in connection with matters entrusted by law to their supervision and control. Such action, as the court below held, falls squarely within the *Vilas* doctrine. See also *Bradley* v. *Fisher,* 13 Wall. 335, 352.

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and this was served upon him by the Marshal. Then and for months earlier a standing Regulation gave warning to him and to the world that without the consent of the Commission there could be no withdrawal of a statement once placed upon the files. I am persuaded that the Rule is valid; that the Commission had abundant reasons for maintaining jurisdiction; and that notice of withdrawal did not nullify the writ."

[7] See also *Resources Corporation International* v. *Securities and Exchange Commission*, 103 F. (2d) 929 (App. D. C.).

3. The holding of the court below that no claim for relief is stated by the allegations charging two specific improper acts, in the nature of slander, by Commissioners Kennedy and Landis likewise presents no question warranting the issuance of a writ of certiorari. It is unnecessary for us to show that the Court of Appeals correctly applied the law of slander to the allegations in question, since no attempt has been made by petitioner to show that the decision is incorrect as a matter of law or that it is in conflict with any decision of this Court or of any circuit court of appeals. The question is obviously not one of such a nature as to justify review by this Court in the absence of conflict.

4. Similarly, there is no occasion for this Court to review the holding of the court below that no cause of action against respondents is stated by the allegations charging misconduct on the part of former employees of the Commission. These allegations contain charges ranging from the alleged act of one employee in soliciting and accepting a bribe from petitioner to the alleged act of another employee in pushing a member of petitioner's staff into a fireplace. We do not detail these allegations, since it is clear, under the doctrine of *Robertson* v. *Sichel*, 127 U. S. 507, that superior executive officers of the Government are not individually responsible for the misconduct of their subordinates, at least where the superior officers do not direct or participate in the misconduct.

Petitioner seeks to avoid the *Sichel* doctrine by asserting that the complaint alleges "that the re-

spondents were aware of the activities of the subordinates and counseled and directed them as to their part in the conspiracy" (Pet. 30). On the basis of this assertion, petitioner urges that the court below failed to give proper effect to an applicable decision of this Court. Regardless of the merits of petitioner's position if his assertion were true, the fact is that the complaint contains no allegation that any act of a subordinate was done with the knowledge, approval, or acquiescence of any of the respondents.[8] In the absence of such an allegation the doctrine of *Robertson* v. *Sichel* is plainly applicable.

5. Petitioner asserts that Messrs. Lane, McNulty, and Kline are barred from representing the respondents in this action because they are attorneys employed by the Securities and Exchange Commission.[9] The point is made simply as an assertion, without support of authority,[10] and no

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[8] In paragraph 41 (R. 69) it is alleged that the defendants, "acting through defendant Flynn" (one of the subordinates named but not served as a defendant), interfered with the publication of petitioner's book. Apart from the failure of the allegation to state a claim as a matter of tort law, the court below correctly held (R. 88) that, "The preposition 'through' should not pierce the protection surrounding those who carry out the services of government, making the Commissioners liable for the acts of an employee."

[9] On September 30, 1938, Mr. McNulty resigned from the Commission's staff.

[10] The only cases cited deal with the right of a court to call upon an attorney to show his client's authorization to appear. However, no question has been raised in this case as to the attorneys' authority from their clients.

suggestion is made as to why the question is one justifying the grant of certiorari. The decision of the court below on this point was obviously correct; and the argument to the contrary displays a lack of merit bordering on frivolity.

CONCLUSION

The decision of the Court of Appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General,
RICHARD H. DEMUTH,
Attorney,
CHESTER T. LANE,
General Counsel,
ORRIN C. KNUDSEN,
JAMES A. PIKE,
Attorneys,
Securities and Exchange Commission,
Counsel for respondents Mathews and Healy.
ROBERT E. KLINE, JR.,
Assistant General Counsel,
Securities and Exchange Commission,
Counsel for respondents Mathews, Healy and Landis.
E. CORTLANDT PARKER,
Counsel for respondent Kennedy.

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